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**IN THE
COURT OF APPEALS OF INDIANA**

KELLY L. STACY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A03-0510-CR-500

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0404-FB-28

August 25, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary

Kelly L. Stacy was found guilty following a jury trial of one count of neglect of a dependent as a Class B felony, one count of neglect of a dependent as a Class C felony, and four counts of neglect of a dependent as Class D felonies. The Class C felony and one Class D felony were merged into the Class B felony because they all related to Stacy's youngest child, K.S. Stacy was sentenced to eight years incarceration for the Class B felony conviction, one year for each of the three remaining Class D felony convictions, and the sentences were ordered to be served consecutively. She now appeals her conviction of the Class B and Class C felonies, challenging the sufficiency of the evidence supporting those convictions, and also appeals her sentence. We affirm the imposition of consecutive sentences, but hold that there is insufficient evidence to support her Class B and Class C felony convictions. We therefore affirm in part, reverse in part, and remand.

Issues

Stacy raises two issues on appeal, which we restate as follows:

1. Whether the State presented sufficient evidence to support Stacy's convictions of Class B and Class C felony neglect of a dependent; and
2. Whether the trial court properly ordered her to serve consecutive sentences.

Facts and Procedural History

Stacy and Andrew Stacy are the parents of four children. On October 3, 2003, Stacy took their youngest daughter, two-month old K.S., to see Dr. Sylvia Vicente because K.S. had been sick. Dr. Vicente diagnosed K.S. with an ear infection and bronchitis. Although

she also noted crackling sounds in her chest, an x-ray was negative for pneumonia. Nonetheless, Dr. Vicente performed a nebulizer treatment on K.S. during the office visit. Amoxicillan was prescribed for the ear infection and Stacy was given a nebulizer to continue the treatments at home. Stacy was instructed to bring K.S. back for a follow-up on October 6. However, Stacy failed to do so.

After Stacy did not appear for the October 6 appointment, Dr. Vicente called Stacy's contact number and reached K.S.'s paternal grandfather. The grandfather said that he had seen K.S. that day and she was fine. Dr. Vicente told him that even if K.S. was better, she needed to come back into the office because she did not get her vaccinations on October 3 due to her illness. K.S. was scheduled for two more appointments with Dr. Vicente, October 24, and November 2, but missed these appointments as well. On December 16, Stacy and Andrew took K.S. to the hospital where K.S. was "dead on arrival," already showing signs of rigor mortis. Dr. John Cavanaugh, who performed an autopsy on K.S., testified that the cause of death was pneumonia, which was composed of tracheal bronchitis, interstitial pneumonia and bronchopneumonia.

As a result of K.S.'s death, the State charged Stacy with three counts of neglect of a dependent, the first as a Class B felony, the second as a Class C felony, and the third as a Class D felony. The State also charged Stacy with three counts of Class D felony neglect of a dependent with respect to her other children.¹ The jury found Stacy guilty on all six counts.

¹ Due to K.S.'s death, the police department investigated the home where K.S. died. The officers inspecting the home noted that the house was full of dirty clothes, garbage, rotting food, and smelled of raw sewage. One of the officers testified that he saw rotting food "on the stove, countertops, everywhere. Garbage was literally piled from the countertop to the cabinets, on the floors, everywhere within the place."

Judgment of conviction was entered only on the Class B felony conviction with respect to K.S., and on the three Class D felony convictions pertaining to the other children. Stacy received reduced sentences for the Class B felony and each of the three Class D felonies. However, the trial court ordered that the sentences be served consecutively, resulting in an aggregate sentence of eleven years. Stacy now appeals.

Discussion and Decision

I. Sufficiency of Evidence

Stacy contends that the State did not present sufficient evidence to support her Class B and Class C felony convictions.

A. Standard of Review

When reviewing a challenge to the sufficiency of the evidence, this court neither reweighs the evidence nor judges the credibility of the witnesses. Smith v. State, 725 N.E.2d 160, 161 (Ind. Ct. App. 2000). We consider only the evidence most favorable to the judgment, as well as all reasonable inferences to be drawn therefrom. Id. If the evidence and inferences provide substantial evidence of probative value to support the judgment, we must affirm. Id.

B. Evidence of Neglect

Stacy argues that there was not sufficient evidence to support the jury finding that she

Tr. at 61. The officers also discovered an exposed electrical outlet, exposed electrical wire, and an uncapped pipe in the bathroom. Child Protective Services determined that the home was unsafe and took the three remaining children into custody. A.S. was found to have head lice, open sores and scabies, which caused her to be hospitalized. H.S. was hospitalized with a burst eardrum and lice. T.S. was undernourished.

was guilty of Class B and Class C felony neglect of a dependent; however, Stacy does not challenge her Class D felony convictions.² Stacy notes that the elements of neglect of a dependent, found in Indiana Code section 35-46-1-4, require that the State prove that Stacy knowingly or intentionally placed K.S. in a situation that endangered her life or health. Stacy maintains that she was unaware that K.S. had pneumonia or required further medical treatment. Thus, according to Stacy, there is insufficient evidence to support a conviction based on knowledge that K.S. was placed in a dangerous situation.

In Mallory v. State, 563 N.E.2d 640 (Ind. Ct. App. 1990), trans. denied, the defendant was convicted of neglect of a dependent when she refused to take her daughter, who exhibited signs of medical need, to the hospital. In that case, we stated that a person engages in conduct knowingly if, when she engages in the conduct, she is aware of a high probability that she is doing so. Id. at 644. See also Ind. Code § 35-41-2-2(b). This standard was clarified in a recent case, Sanders v. State, 734 N.E.2d 646 (Ind. Ct. App. 2000), trans. denied, in which we stated that “to prove that Sanders acted knowingly, the State had to show that she was ‘subjectively aware of a high probability that [s]he placed the child in a dangerous situation.’” Id. at 650 (quoting Thames v. State, 653 N.E.2d 517, 517 (Ind. Ct. App. 1995), trans. denied). The standard was further refined in Gross v. State, 817 N.E.2d 306 (Ind. Ct. App. 2004), in which we noted that the danger must be “actual and appreciable.” Id. at 309. This was to distinguish neglect as criminalized by the statute from

² Class B, Class C, and Class D felony neglect of a dependent are differentiated solely on the result of the action. Each requires knowledge or intent; however a Class D felony does not require injury, a Class C felony requires bodily injury, and a Class B felony requires serious bodily injury to occur. Ind. Code § 35-46-1-4(a), (b)(1), and (b)(2).

the normal risk of childhood bumps and bruises. Id.

Stacy compares the facts of her case to those in Fout v. State, 619 N.E.2d 311 (Ind. Ct. App. 1993). In Fout, the defendant gave birth to a child who died within twenty-four hours from a bacterial infection contracted in utero. The infant's infection occurred as a result of the defendant's water breaking prematurely. The defendant had been informed of the possibility of an infection, but the record did not show that she was ever told that she actually had the infection. Moreover, although the child exhibited some signs of not being well after birth, there was no evidence that the defendant knew these signs indicated that the child was in danger. As a result, the court found that the State did not prove that the defendant had the subjective knowledge that she was exposing her child to harm. Id. at 312.

Stacy contends that the lack of knowledge by the defendant in Fout mirrors her own lack of knowledge. However, the facts are slightly different. In Fout, the defendant was told that an infection could develop, but was not told that an infection existed. In this case, Stacy was informed by Dr. Vicente that K.S. had bronchitis-like symptoms and a follow-up visit was scheduled before Stacy left the office that day. After Stacy missed the first scheduled follow-up appointment on October 6, 2003, Dr. Vicente called Stacy's residence to inform her that K.S. needed to come back to the office. She spoke with K.S.'s paternal grandfather, who said he had seen K.S. that day and she seemed fine. Dr. Vicente informed him that even if K.S. was better, she still needed to return to the office to get the vaccinations she was unable to administer on October 3 due to K.S.'s illness. However, instead of taking K.S. back to the doctor's office, Stacy missed additional scheduled appointments on October 24

and November 2, 2003. Unlike the defendant in Fout, Stacy was aware of her daughter's bronchitis-like symptoms as well as her doctor's advice to bring K.S. in for a follow-up appointment. In addition, Stacy had already exhibited an awareness of the need for medical treatment when she took K.S. to the doctor on October 3 because she had been sick for a few days. Therefore, this case is distinguishable from the situation in Fout where the defendant was never informed that her child was sick.

Stacy, her husband, and at least one other defense witness all testified that K.S. recovered from her October illness and was fine in the days leading up to and including the day of her death. Dr. Cavanaugh was asked what symptoms the child would have based on the level of infection found during the autopsy, and testified as follows:

Early phase, in my opinion, would have been just the tracheal bronchitis which would have been, you know, your typical flu symptoms, runny nose, maybe fever, maybe not, cough, generally a dry cough because there isn't a lot of mucus production by that. . . . Middle stages would be the onset of bronchopneumonias, you would have actually had something coming up, been associated with maybe fever and chills. . . . And then the third stage, which would have been the sepsis stage, which would have been actually the body temperature goes down, the body's very sick, everything is basically shutting down. They're cold, chills predominate. There might not be a coughing because you're just not responding as well to your internal environment. . . . This would have been an extremely sick individual.

Tr. at 201-02. Dr. Cavanaugh was not specifically asked whether K.S.'s death was related to her condition on October 3, nor was he asked to pinpoint the timeline of the phases he described above. Dr. Vicente was not asked whether K.S.'s death was related to either her condition at the office visit on October 3 or to her parents' failure to bring her to subsequent appointments.

As discussed above, there is evidence supporting Stacy's subjective knowledge of K.S.'s illness. We also believe there is evidence supporting a causal connection between K.S.'s condition on October 3 and her death.³ Missing appointments with Dr. Vicente was clearly negligent when not only had Stacy been told to bring K.S. back at the time of the October 3 appointment, but Dr. Vicente also contacted the family and specifically stated that K.S. needed to return to her office. However, we do not believe that the evidence rises to the level of proving that Stacy had the heightened awareness that an actual and appreciable danger to K.S. was highly probable from her conduct, as required for conviction of neglect as a Class B or Class C felony. The missed appointments made proving Stacy's awareness more difficult, because there was no medical evidence of K.S.'s actual condition between October 3 and December 16, although it would not have been impossible to prove with more careful and specific testimony from the medical professionals. As the record stands, however, Dr. Cavanaugh's testimony is at best equivocal. Did K.S. pass through all three stages after her office visit with Dr. Vicente in October, or was K.S. already in stage two when she saw Dr. Vicente and therefore what her parents perceived as her getting better was in fact her going through stage three, in which her temperature went down, her cough subsided, and although she was still symptomatic, the outward signs of sickness were not as obvious? Without further testimony from which the jury could tie Dr. Cavanaugh's textbook

³ In this regard, we part ways with another panel of this court that decided the companion case of Stacy's husband, Andrew Stacy. Stacy and her husband were tried together and both were convicted of Class B and Class C felony neglect with respect to K.S. The panel that decided Andrew's case held that "[t]he State presented no evidence of a relationship between K.S.'s condition on October 3, 2004 and her death or of the likely time progression of K.S.'s disease." Andrew Stacy v. State, No. 45A03-0510-CR-499, slip op. at 9

description to the actual progression of K.S.'s illness, we must hold that the State failed to meet its burden to prove that Stacy was aware of a high probability that her actions placed K.S. in actual and appreciable danger. Accordingly, her convictions for Class B and Class C felony neglect must be reversed.⁴

II. Sentencing

Stacy argues that the trial court erred by ordering her sentences to be served consecutively.

A. Standard of Review

Sentencing determinations are within the sound discretion of the trial court, and we will only reverse for an abuse of discretion. Krumm v. State, 793 N.E.2d 1170, 1186 (Ind. Ct. App. 2003). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

B. Imposing Consecutive Sentences

Stacy argues that the trial court erred when it imposed consecutive sentences because a sentence of less than the presumptive was imposed for each conviction and no aggravating circumstance was specifically found. The trial court's sentencing order lists four mitigating circumstances – including that Stacy has no history of criminal convictions and that she has expressed sincere remorse – and no aggravating circumstances. Moreover, the order states

(Ind. Ct. App., Aug. 25, 2006). As stated, we believe there was evidence of such a relationship, it was just not sufficient evidence to prove the relationship beyond a reasonable doubt.

⁴ The jury also found Stacy guilty of Class D felony neglect with respect to K.S., but the trial court merged the Class D felony into the Class B felony at sentencing. Because we have reversed both the Class B and Class C convictions, and because Stacy does not challenge the sufficiency of the evidence supporting the

that “the Court finds that the aggravating factors and mitigating factors have been balanced and the mitigating factors outweigh the aggravating factors.” Appendix to Brief of Appellant at 33. The trial court imposed a one-year sentence for each of Stacy’s Class D felony convictions, which is less than either the presumptive sentence in effect at the time of the crime and the advisory sentence in effect at the time of her trial and sentencing. See Ind. Code § 35-50-2-7. The trial court then ordered that the sentences be served consecutively because “it is discretionary” and “there are multiple victims involved.” App. to Brief of Appellant at 33.

In order to impose consecutive sentences, a trial court must find at least one aggravating circumstance. Jones v. State, 705 N.E.2d 452, 455 (Ind. 1999). If the trial court imposes consecutive sentences when not statutorily required to do so, the trial court must explain its reasoning by (1) identifying all significant aggravating and mitigating circumstances, (2) stating the specific facts and reasons for finding the existence of each such circumstance, and (3) demonstrating that the aggravating and mitigating circumstances have been evaluated and balanced. Cuyler v. State, 798 N.E.2d 243, 246 (Ind. Ct. App. 2003) (citing Ortiz v. State, 766 N.E.2d 370, 377 (Ind. 2002)).

Here, the trial court found no aggravating circumstances for the purpose of enhancing each individual sentence, and in fact, found mitigating circumstances justifying reduced individual sentences. However, in considering Stacy’s overall sentence, the trial court found that the fact there were multiple victims was an aggravating circumstance justifying

Class D felony conviction, we instruct the trial court to reinstate the Class D felony and re-sentence Stacy

consecutive sentences. We have previously held that the existence of multiple victims is a valid aggravator for imposing consecutive sentences. Altes v. State, 822 N.E.2d 1116, 1126 (Ind. Ct. App. 2005), trans. denied.

Stacy cites White v. State, 847 N.E.2d 1043 (Ind. Ct. App. 2006), to support her argument that the trial court cannot impose consecutive sentences where less than the presumptive sentence was imposed for each conviction. In White, the defendant entered a plea of guilty to fifteen charges. The trial court sentenced the defendant to less than the presumptive for each count, then ordered some of the sentences served consecutively. Citing Marcum v. State, 725 N.E.2d 852, 863-64 (Ind. 2002), in which our supreme court held that when a trial court finds the aggravating and mitigating circumstances to be in balance, there is no basis on which to impose consecutive terms, this court held that where the trial court implicitly finds the mitigators outweigh the aggravators, as it must have in order to impose reduced sentences, and does not specifically explain why consecutive sentences are justified, consecutive reduced sentences are in error. 847 N.E.2d at 1046-47. We did note, however, that even where a court orders presumptive or reduced sentences, it may still impose consecutive sentences if it makes the required finding that the aggravators outweigh the mitigators such that consecutive sentences are appropriate. Id. at 1046 n.5. See also Plummer v. State, 851 N.E.2d 387, 392 n.3 (Ind. Ct. App. 2006). Such is the case here. As stated above, in considering the appropriate sentence for each individual conviction, the trial court found the mitigators outweighed the aggravators and imposed reduced sentences. In

accordingly.

considering the appropriate overall sentence for Stacy's crimes, however, the trial court articulated its reasoning for finding that the multiple victim aggravator outweighed the mitigators and justified consecutive sentences. In this case, the trial court did not abuse its discretion in ordering reduced consecutive sentences.

Conclusion

We hold there was insufficient evidence to support Stacy's convictions of neglect of a dependent as a Class B and a Class C felony, and therefore order that those convictions be vacated. The trial court's order for consecutive sentences was not in error, but the trial court is directed on remand to otherwise modify Stacy's sentence in accordance with this opinion.

Affirmed in part, reversed in part, and remanded.

SHARPNACK, J., and NAJAM, J., concur.